

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

FILED

AUG 28 2012

United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 11-54539-ASW
KENNETH S. CHOE AND YONG H. CHOE,]	Chapter 7
Debtors.]	
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UNDON PAIK,]	
Plaintiff,]	AP No. 11-05240-ASW
vs.]	
KENNETH S. CHOE AND YONG H. CHOE,]	
Defendants.]	
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**MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Before the Court is a motion ("Motion") by Defendants Kenneth and Yong Choe ("Defendants") seeking summary judgment or adjudication on Plaintiff's claims. Plaintiff Undon Paik ("Plaintiff") filed an opposition ("Opposition") to the Motion on July 3, 2012, and Defendants filed a Reply on July 9, 2012. The Motion was set to be heard on July 12, 2012, but because the Opposition was filed after the deadline provided by Bankruptcy

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1 Local Rule 7003-1(b), the Court issued an order continuing the
2 hearing to August 28, 2012.

3 Plaintiff is represented by John V. Mejia, Esq. Defendants
4 are represented by Steven Knuppel, Esq., of the Fuller Law Firm.
5 Upon consideration of the parties' written arguments and evidence,
6 the Court grants Defendants' Motion in part and denies the Motion
7 in part.

8
9 **Background**

10 On January 12, 2009, Plaintiff filed a lawsuit against
11 Defendant Kenneth Choe ("Choe")¹ in Santa Clara County Superior
12 Court, alleging that Choe knowingly took part in a Ponzi scheme
13 that deprived Plaintiff of Plaintiff's savings. In the state court
14 lawsuit, Plaintiff asserted claims of fraud, negligent
15 misrepresentation, breach of contract, and violations of 18 U.S.C.
16 § 1962(a), (c), and (d) of the Racketeer Influenced and Corrupt
17 Organizations Act ("RICO"). On May 11, 2011, Defendants filed for
18 Chapter 7 bankruptcy. Plaintiff filed a complaint with this Court,
19 alleging that Choe: (1) made false representations; (2) committed
20 fraud as a fiduciary; (3) committed a willful and malicious injury
21 against Plaintiff; (4) concealed, destroyed, falsified, or failed
22 to keep or preserve any recorded information; and (5) made a false
23 oath when both Defendants swore under penalty of perjury that
24 Defendants provided correct information on Defendants' bankruptcy
25 petition. Plaintiff argues that as a result, Defendants should be
26 denied a discharge of this specific debt under 11 U.S.C.

27 ¹ There are no factual issues concerning Yong Choe, Kenneth
28 Choe's spouse, who appears to be named as a Defendant solely
because Yong Choe is a debtor.

1 § 523(a)(2), (4), and (6), and a general discharge under 11 U.S.C.
2 § 727(a)(3) and (4).

3
4 **Standard of Review**

5 Summary judgment shall be rendered by the Court if the
6 pleadings, depositions, answers to interrogatories, and admissions
7 on file, together with the affidavits, if any, show that there is
8 no genuine issue as to any material fact and that the moving party
9 is entitled to a judgment as a matter of law. Fed. R. Bankr. P.
10 7056 (incorporating Fed. R. Civ. P. 56); Matsushita Elec. Indus.
11 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 584-85 (1986). All
12 reasonable inferences must be drawn against the moving party.
13 Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); United
14 States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The Court may
15 not weigh the evidence or make credibility determinations. See
16 Bravo v. City of Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011).

17 Material facts are those that may affect the outcome of the
18 case. A dispute as to a material fact is genuine if there is
19 sufficient evidence for a reasonable jury to return a verdict for
20 the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S.
21 242, 248 (1986). Because Plaintiff -- not Defendants -- bears the
22 burden of proof at trial, Plaintiff must produce sufficient
23 competent evidence to establish a prima facie claim to avoid
24 summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-
25 23 (1986).

1 **Material Facts**

2 Based upon the evidence submitted by the parties, which the
3 Court construes in a light most favorable to Plaintiff, the Court
4 makes the following findings for purposes of this Motion only.

5 Plaintiff is Korean. Sometime in 2005, representatives of SNC
6 Investments, Inc. and SNC Asset Management, Inc. (collectively
7 referred to as "SNC") began visiting Plaintiff and various other
8 members of the Korean community, promoting investment opportunities
9 in SNC.² Plaintiff was initially unsure of whether to invest, and
10 therefore consulted Plaintiff's CPA, Andrew Jean ("Jean"), Choe's
11 brother. Plaintiff had known Jean and Jean's family for several
12 years prior to Plaintiff hiring Jean as Plaintiff's CPA. After
13 talking to Jean, Plaintiff made an initial investment of \$50,000 on
14 or about April 7, 2005. Later, according to Plaintiff's answer to
15 Interrogatory 3, attached to Plaintiff's attorney's declaration,
16 Jean encouraged Plaintiff to invest more money. On October 29,
17 2008, media reports began to surface that SNC was a Ponzi scheme.³
18 Plaintiff never received the promised returns on his investments.
19 In fact, according to Plaintiff's response to Interrogatory 11,
20 attached to Plaintiff's attorney's declaration, Plaintiff lost
21 investments in the amount of \$615,777.47.

22 Plaintiff and Defendants dispute Choe's role in SNC. In
23 Plaintiff's declaration, Plaintiff states that Choe was one of the

24 ² Plaintiff's declaration contains some dating discrepancies.
25 On Page 2, Lines 18-20, Plaintiff states that Choe entered
26 Plaintiff's restaurant in 2005 and convinced Plaintiff to invest.
27 Yet on Page 3, Line 19, Plaintiff states that Choe began visiting
28 Plaintiff's restaurant "in approximately" 2006.

29 ³ According to the Defendants' motion papers (with no
30 declaration or other evidentiary support), due to SNC closing its
31 operations, Korean investors were expected to lose \$70 million in
32 investments.

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1 members of SNC who made visits to Plaintiff's restaurant and
2 initially encouraged Plaintiff to invest. Choe told Plaintiff that
3 SNC would produce a higher interest rate than the banks and
4 Plaintiff could withdraw Plaintiff's money at any time. After
5 Plaintiff invested the first \$50,000, Choe -- in addition to Jean -
6 - encouraged Plaintiff to invest more money. According to
7 Plaintiff, Choe also "targeted" Koreans who were church members and
8 retired. Plaintiff believes that the entire time, Choe was aware
9 that SNC was a Ponzi scheme. Plaintiff believed that Choe had this
10 knowledge because Choe routinely spent time with the principals and
11 owners of SNC, playing golf, drinking, and sometimes taking trips
12 to South Korea with them. Choe was also told by an unspecified
13 individual to leave a meeting for investors who were victims of SNC
14 because Choe was an agent of SNC. Plaintiff believes that Choe was
15 a fund manager who deposited investors' money in a single bank
16 account and then used the account to pay Choe's personal expenses.

17 In Choe's declaration, Choe denies being a fund manager,
18 having spoken to Plaintiff about investing in SNC, or having
19 received money from Plaintiff. Choe also denies being an employee
20 or owner of SNC, and states that Choe did not hold any position
21 that would require Choe to keep records of other people who
22 invested. Choe denies Plaintiff's claim that Choe diverted funds
23 for personal use. Choe states that Choe did not learn SNC was a
24 Ponzi scheme until October 29, 2008, and also lost money through
25 investments in SNC.

Analysis

A. 11 U.S.C. § 523(a)(2)(A) Fraud Claim

Under 11 U.S.C. § 523(a)(2)(A), an individual debtor is not discharged from debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." To establish a claim under section 523(a)(2)(A), seven elements must be met: (1) a representation of fact was made by the debtor; (2) that was material; (3) that the debtor knew at the time was false; (4) that debtor made with the intention of deceiving the creditor; (5) upon which the creditor relied; (6) the reliance was reasonable; and (7) damage proximately resulted from the representation. Siriani v. Northwestern Nat'l Ins. Co. (In re Siriani), 967 F.2d 302, 304 (9th Cir. 1992).

Defendants argue that Plaintiff cannot prove that Choe's behavior met the first six of these elements. In his declaration, Choe states that Choe never had any conversations with Plaintiff, or provided Plaintiff with written materials, about investing in SNC. Choe also states that Choe had no knowledge, prior to October 29, 2008, that SNC was a Ponzi scheme.

Plaintiff argues that Plaintiff has sufficient evidence that Choe's actions fall within section 523(a)(2)(A). Regarding the first two elements, Plaintiff's declaration states: "I recall [Choe] representing himself as a fund manager to me." According to Plaintiff, beginning in 2006, Choe came into Plaintiff's restaurant with other members of SNC, where Choe talked about "how good of an investment it was . . . how SNC Investments, Inc. would give me

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1 hire [sic] interest rates than banks, and promising high rates of
2 return and better than bank rates of return, and that I would be
3 able to pull out my money at any time, etc." Regarding the third
4 and fourth elements, Plaintiff relies on circumstantial evidence.
5 Plaintiff states in his declaration that while Plaintiff might lack
6 personal knowledge that Choe knew of the Ponzi scheme, evidence of
7 Choe's relationship with the SNC leadership suggests that Choe was
8 at least aware that SNC was promoting a Ponzi scheme. According to
9 Plaintiff, prior to October 29, 2008, Choe was "usually with
10 principals and owners of SNC Asset Management, Inc.," playing golf
11 and drinking, as well as taking trips with the principals and
12 owners to South Korea. Plaintiff contends that if Choe was aware
13 that SNC was a Ponzi scheme, then Choe's statements to Plaintiff
14 were necessarily intended to deceive Plaintiff as to SNC's true
15 nature.

16 The Court finds that Plaintiff's evidence on the first four
17 elements is sufficient. Plaintiff's evidence that Choe met
18 regularly with the SNC leadership raises the possibility that Choe
19 understood the true nature of SNC and therefore that Choe knew
20 Choe's alleged representations to Plaintiff were false and Choe
21 sought to deceive Plaintiff.⁴

22 Defendants argue that even if Plaintiff provided sufficient
23 evidence for elements (1) through (4), Plaintiff has failed to
24 provide evidence for elements (5) and (6): that Plaintiff relied
25 upon these representations and that the reliance was reasonable.

26 ⁴ Defendants argue in their Reply that Plaintiff failed to
27 provide evidence of how Plaintiff knew of Choe's relationship with
28 SNC, but Defendants' declarations do not provide any facts
indicating how Plaintiff could not have known.

1 Attorney Steven T. Knuppel's declaration refers to Plaintiff's
2 response to Interrogatory 23, which states that Plaintiff was
3 "always nervous about his investment" and that Plaintiff had
4 consulted Choe's brother, Andrew Jean, before investing.
5 Defendants argue that this shows that Plaintiff relied upon Jean's
6 representations rather than Choe's.

7 In Plaintiff's declaration, Plaintiff states that Plaintiff
8 relied upon Choe's representations despite feeling reluctant and
9 unsure at first, and that it was "only natural that [Plaintiff]
10 speak with [his] CPA Andrew Jean." Plaintiff also states that
11 Plaintiff's reliance was reasonable because Plaintiff had known
12 Jean and Jean's family for several years prior to Plaintiff hiring
13 Jean as Plaintiff's CPA.

14 The Court finds that Plaintiff's proffered evidence is
15 sufficient to demonstrate genuine disputes of fact on this claim.
16 Plaintiff has provided evidence that Choe may have known about
17 SNC's Ponzi scheme and that Plaintiff may have reasonably relied,
18 at least in part, on Choe's representations intended to induce
19 Plaintiff to invest. The Court therefore denies Defendants' Motion
20 on this claim.

21
22 **B. 11 U.S.C. § 523(a)(4) Fraud as a Fiduciary Claim**

23 The next issue is whether Plaintiff has provided sufficient
24 evidence that Choe committed fraud while acting as a fiduciary.
25 Under 11 U.S.C. § 523(a)(4), an individual debtor is not discharged
26 from debt "for fraud or defalcation while acting in a fiduciary
27 capacity, embezzlement, or larceny."
28

1 In order to establish that Choe committed fraud in a fiduciary
2 capacity, Plaintiff must first provide evidence that Choe was a
3 fiduciary of SNC. However, a "fiduciary" in the context of section
4 523(a)(4) is different from the broad definition used in the
5 nonbankruptcy context -- a relationship involving trust,
6 confidence, and good faith. Honkanen v. Hopper (In re Honkanen),
7 446 B.R. 373, 378 (B.A.P. 9th Cir. 2011). A fiduciary relationship
8 under section 523(a)(4) must arise from "an express or technical
9 trust that was imposed before, and without reference to, the
10 wrongdoing that caused the debt as opposed to a trust ex maleficio,
11 constructively imposed because of the act of wrongdoing from which
12 the debt arose." Id. at 378-79 (citing Ragsdale v. Haller, 780
13 F.2d 794, 796 (9th Cir. 1986)). A narrow definition of fiduciary
14 "is consistent with the policy of construing the exceptions to
15 discharge in § 523 strictly against the objecting creditor and
16 liberally in favor of the debtor." Id. at 379 n.5. While the
17 scope of the term "fiduciary duty" is federal in nature, the Ninth
18 Circuit has looked to state law -- in this case, California -- to
19 determine whether a trust relationship exists. Id. at 379. Trusts
20 that arise "as remedial devices to breaches of implied or express
21 contracts -- such as resulting or constructive trusts -- are
22 excluded, while statutory trusts that bear the hallmarks of an
23 express trust are not." Id.

24 Under California law, an express trust arises when five
25 elements are present: (1) intent to create a trust,⁵ (2) trustee,

26 ⁵ Under California Civil Code section 15201, a trust exists
27 only if the settlor manifests intent to create a trust. Cal. Civ.
28 Code § 15201.

1 (3) trust property, (4) a proper legal purpose,⁶ and (5) a
2 beneficiary. Id. at 379 n.6. A technical trust arises "from the
3 relationship of attorney, executor, or guardian, and not to debts
4 due by a bankrupt in the character of an agent, factor, commission
5 merchant, and the like." Id. at 379 n.7.

6 Defendants argue that Plaintiff has not provided sufficient
7 evidence that Choe was a fiduciary under section 523(a)(4). Choe
8 states in his declaration that he was not a fund manager, employee,
9 or owner of SNC and held no position requiring Choe to keep records
10 of other people. Plaintiff argues that Choe's disputed position as
11 a fund manager meant that Choe was acting as a fiduciary.
12 Plaintiff cites several California cases in making his argument.
13 See Assilzadeh v. California Federal Bank, 82 Cal. App. 4th 399
14 (2000); Michelson v. Hamada, 29 Cal. App. 4th 1566 (1994); Youman
15 v. Equifax, Inc., 111 Cal. App. 3d 498 (1980). However, none of
16 the cases on which Plaintiff relies involved bankruptcy. As such,
17 the fiduciary relationship referred to by Plaintiff is the broad
18 definition of fiduciary rather than the definition supplied in
19 Honkanen for section 523(a)(4). See Assilzadeh, 82 Cal. App. 4th
20 at 414 (stating that a broker's fiduciary duty to his clients
21 requires "the highest good faith and undivided service and
22 loyalty"); Michelson, 29 Cal. App. 4th at 1581 ("Confidential and
23 fiduciary relations are, in law, synonymous, and may be said to
24 exist whenever trust and confidence is reposed by one person in the
25 integrity and fidelity of another."); Youman, 111 Cal. App. 3d at

26 ⁶ Under California Civil Code section 15203, a "proper legal
27 purpose" is one that is not illegal or against public policy. Cal.
28 Civ. Code § 15203.

1 517 (noting that a fiduciary relationship is one involving
2 confidence).

3 Plaintiff has not provided sufficient evidence that Choe was a
4 fiduciary for purposes of section 523(a)(4). First, Plaintiff has
5 provided no evidence that a fiduciary relationship arose from a
6 technical trust as defined by Honkanen. A technical trust arises
7 "from the relationship of attorney, executor, or guardian."
8 Honkanen, 446 B.R. at 379 n.7. Choe is described as a fund
9 manager, not an attorney, executor, or guardian. Plaintiff has
10 also provided no evidence that his relationship with Choe held the
11 same weight and importance as an attorney-client relationship.

12 Finally, Plaintiff has provided no evidence of an express
13 trust relationship. Plaintiff's declaration does demonstrate that
14 Choe, if he was a fund manager, would be a trustee, with control
15 over investors' funds, the trust property. In addition, the trust
16 would have had a beneficiary, whether the investors or the SNC
17 executives. However, Plaintiff has provided no evidence that SNC
18 ever had a proper legal purpose, or that there was ever an intent
19 to create a trust. To the contrary, Plaintiff contends that SNC
20 had an illegal purpose -- the Ponzi scheme. Therefore, Plaintiff
21 has not provided sufficient evidence of an express trust. Since
22 Plaintiff not provided evidence that Choe was a fiduciary under
23 section 523(a)(4), the Court grants Defendants' Motion on this
24 claim.

25 **C. 11 U.S.C. § 523(a)(6) Willful and Malicious Injury Claim**

26 Next, the Court considers whether Plaintiff has produced
27 evidence of a willful and malicious injury. Under 11 U.S.C.
28

1 § 523(a)(6), an individual debtor is not discharged from a debt
2 resulting from "willful and malicious injury by the debtor to
3 another entity or to the property of another entity."

4 These are two separate requirements -- the injury must be both
5 willful and malicious. Barboza v. New Form, Inc. (In re Barboza),
6 545 F.3d 702, 706 (9th Cir. 2008). To be willful, an injury must
7 be deliberate or intentional. Id. at 707-08. Reckless conduct
8 does not meet this standard. Id. Rather, the debtor must have
9 intended the consequences of the debtor's actions -- specifically,
10 the debtor must have had a subjective motive to inflict injury or
11 have a belief that injury is substantially certain to result from
12 the conduct. Suarez v. Barrett (In re Suarez), 400 B.R. 732, 736-
13 37 (B.A.P. 9th Cir. 2009); see also Su v. Su (In re Su), 290 F.3d
14 1140, 1142 (9th Cir. 2002). In addition, a deliberate or
15 intentional act which merely leads to injury is not a willful
16 injury. Barboza, 545 F.3d at 706. To be malicious, the injury
17 must involve: (1) a wrongful act (2) which is done intentionally,
18 (3) which necessarily causes injury, and (4) which is done without
19 just cause or excuse. Id.

20 The Plaintiff carries the burden of proof on this claim.
21 Suarez, 400 B.R. at 736. Therefore, the Court looks to see whether
22 Plaintiff has supported both the willful and malicious elements of
23 this claim with sufficient evidence.

24 Neither party disputes that Plaintiff was injured. Plaintiff
25 invested more than once in SNC, and as a result, lost a substantial
26 amount of money. According to Plaintiff's response to
27 Interrogatory 11, attached to Plaintiff's attorney's declaration,
28 Plaintiff lost \$615,777.47. While Defendants argue that Plaintiff

1 has no evidence that Choe subjectively intended to injure
2 Plaintiff, as the Court noted above, Plaintiff's evidence that Choe
3 was a fund manager who spent significant time with the SNC
4 leadership raises a question of fact as to whether Choe knew about
5 the Ponzi scheme. If Choe knew of the Ponzi scheme, and encouraged
6 Plaintiff to invest, that suggests that Choe knew that by
7 encouraging Plaintiff to invest, Plaintiff was substantially
8 certain to lose that investment. For these reasons, Choe's alleged
9 conduct satisfies the "willful injury" standard.

10 There is also evidence that Choe maliciously injured
11 Plaintiff. If Choe knew of the Ponzi scheme, then by encouraging
12 Plaintiff to invest, Choe would have intentionally committed a
13 wrongful act, without just cause or excuse. This act necessarily
14 injured Plaintiff by forcing Plaintiff to lose his savings.
15 Because Plaintiff has provided enough evidence to support this
16 claim, the Court denies Defendants' Motion to dismiss as to this
17 claim.

18
19 **D. 11 U.S.C. § 727 Claims**

20 Plaintiff admits in Plaintiff's Opposition that Plaintiff has
21 not conducted sufficient discovery to provide evidence that Choe
22 failed to keep, or destroyed, records under 11 U.S.C. § 727(a)(3),
23 or that Choe made a false oath or account under 11 U.S.C.
24 § 727(a)(4). Plaintiff requests that the Court permit Plaintiff
25 more time to conduct discovery under Federal Rule of Civil
26 Procedure 56(d)(1) or (d)(2) (incorporated by Federal Rule of
27 Bankruptcy Procedure 7056).
28

1 Rule 56(d)(1) and (d)(2) provide: "If a nonmovant shows by
2 affidavit or declaration that, for specified reasons, it cannot
3 present facts essential to justify its opposition, the court may:
4 (1) defer considering the motion or deny it; or (2) allow time to
5 obtain affidavits or declarations or to take discovery." At the
6 same time, Federal Rule of Civil Procedure "vests the trial judge
7 with broad discretion to tailor discovery narrowly and to dictate
8 the sequence of discovery." Crawford-El v. Britton, 523 U.S. 574,
9 598 (1998). A trial court judge may limit the frequency or extent
10 of use of discovery methods if the court determines "the burden or
11 expense of the proposed discovery outweighs its likely benefit,
12 taking into account the needs of the case, the amount in
13 controversy, the parties' resources, the importance of the issues
14 at stake in the litigation, and the importance of the proposed
15 discovery in resolving the issues." Id. at 599.

16 Here, Plaintiff and Defendant had four months to conduct
17 discovery between the time Plaintiff filed the First Amended
18 Complaint on February 16, 2012, and the time Defendants filed the
19 current Motion on June 12, 2012. Plaintiff's attorney admits in
20 his declaration that Plaintiff's attorney has been unable to
21 conduct discovery due to his "heavy schedule" and that is "no
22 excuse." The Court notes that no discovery deadline has been set
23 because the Case Management Conference is on hold pending the
24 outcome of this Motion. Therefore, the discovery period is still
25 open, which would enable Plaintiff to continue gathering the
26 necessary documents to support Plaintiff's 727 claims. However,
27 given that Plaintiff has had four months since the filing of the
28 First Amended Complaint, and more than one year since Plaintiff

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1 filed the original Complaint, and given that Plaintiff has no valid
2 excuse for the lack of discovery, the Court finds that granting
3 Plaintiff extended time would cause an undue burden and unnecessary
4 delay. The Court therefore grants Defendants' Motion on both
5 claims.

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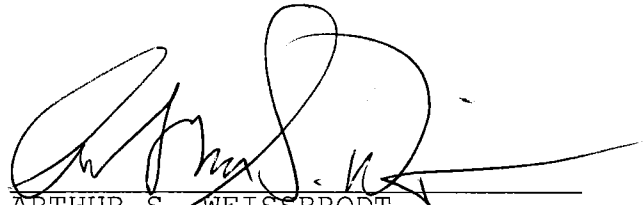
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Conclusion

The Motion is denied with respect to Plaintiff's claims that Defendants' debt should not be discharged under section 523(a)(2) and (a)(6). The Motion is granted on Plaintiff's claims seeking to deny a discharge under sections 523(a)(4) and 727.

IT IS SO ORDERED.

Dated: August 28, 2012



ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

- 1 Court Service List
- 2 Court Service List
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